

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 31, 2000

UNITED MINE WORKERS OF AMERICA,	:	
LOCAL UNION 2232, DISTRICT 20,	:	
on behalf of MINERS	:	Docket No. VA 99-79-C
	:	
v.	:	
	:	
	:	
ISLAND CREEK COAL COMPANY	:	

BEFORE: Marks, Riley, and Verheggen, Commissioners¹

DECISION

BY: Marks and Riley, Commissioners

¹ Chairman Jordan and Commissioner Beatty recused themselves in this matter and took no part in its consideration. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

This is a compensation proceeding filed by Local Union 2232, District 20, United Mine Workers of America (“UMWA”) against Island Creek Coal Company (“Island Creek”), pursuant to section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 821 (1994) (“Mine Act” or Act).² The Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a withdrawal order under section 107(a) of the Act, 30 U.S.C. § 817(a), as a result of high methane readings in Island Creek’s VP 8 Mine. Administrative Law Judge Avram Weisberger denied the application for compensation. 21 FMSHRC 1093 (Oct. 1999) (ALJ). The UMWA filed a petition for discretionary review which the Commission granted. For the reasons that follow, we reverse the decision of the judge and remand the proceeding for calculation of compensation owed to miners.

I.

Factual and Procedural Background

Island Creek operates the VP 8 Mine, an underground coal mine in southwestern Virginia. 21 FMSHRC 1093. On December 2, 1998, MSHA Inspector David Fowler examined three entries in the mine. *Id.* UMWA walk-around representative Billy Shelton and Island Creek mine safety inspector Michael Canada accompanied Fowler on the ride underground. *Id.* Fowler and Canada got off the ride and entered the return airway, while Shelton continued to the bottom of the Deskins B shaft to wait and pick them up. Tr. 14. Fowler and Canada each carried a digital methane detector. 21 FMSHRC at 1093. As they reached the No. 1 west development area, Fowler’s methane detector registered 2.1 percent, while Canada’s detector indicated 1.8 percent methane. *Id.* at 1093-94.

Fowler and Canada continued to walk further down the entry to determine the areas affected and to locate the source of the methane. *Id.* at 1094. At the No. 1 entry, east of the No. 19 seal, Fowler and Canada took additional methane readings, with Fowler’s monitor indicating a level of 4.5 percent methane and Canada’s several tenths of a percentage less. *Id.* and n.2.

² Section 111 of the Act provides,

If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift.

Shortly after 11:00 a.m., Shelton rejoined Fowler and Canada. Tr. 15. Fowler asked Shelton to retrieve Fowler's Riken methane detector from the vehicle in which the three had been riding. 21 FMSHRC at 1094. The Riken detector is more accurate than digital methane monitors. *Id.* Canada told Fowler that, if the Riken detector gave a methane reading of 4.5 percent, he would have to pull his miners based on Virginia law. *Id.*

At 11:30 a.m., Shelton returned with the Riken detector, which indicated that methane had accumulated to a level of 4.5 percent at the No. 2 development area. *Id.* Canada left Fowler and Shelton to telephone the mine dispatcher to notify him to withdraw the miners due to the high level of methane. *Id.* Fowler and Shelton continued south in the No. 1 entry and took readings as high as 10 percent in the No. 4 and 5 development areas. *Id.* They discovered that the plaster had fallen off the seals separating those areas from the gob, indicating a possible source of the methane. *Id.*

Around 12:00 noon, Canada rejoined Fowler and Shelton in the No. 4 development area. *Id.* Fowler took methane readings in the range of 8 to 9 percent. *Id.* Fowler then told Canada he was going to issue a section 107(a) withdrawal order, since he knew the origin of the methane and the areas of the mine affected.³ *Id.* and *id.* at 1098 n.4.

It was stipulated that, at 12:12 p.m., Fowler issued a section 104(a) citation⁴ and a section 107(a) withdrawal order.⁵ *Id.* at 1094 n.1, 1095. Fowler testified at trial that it was at that time that he determined the miners should be withdrawn. *Id.* at 1095. The order, which was reduced to writing after Fowler exited the mine, described the conditions warranting the issuance of the

³ While Canada testified that Fowler did not ask him to withdraw miners from the mine, he did not deny that Fowler told him that he had a section 107(a) withdrawal order. Tr. at 118-20.

⁴ The citation alleged a violation of 30 C.F.R. § 75.323(e), which prohibits methane levels exceeding 2 percent in a split of air. 21 FMSHRC at 1094 n.1. The citation was ultimately vacated. *Id.*

⁵ Section 107(a), 30 U.S.C. § 817(a), provides, in relevant part,

If, upon any inspection or investigation . . . , an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, . . . , to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

order and identified the areas affected by the withdrawal order as the No. 4 and 5 developments.⁶ *Id.*; UMW Ex. A. Sometime after 1:00 p.m., Fowler encountered some miners along the trackway inside the mine and told them to go outside until he could determine why the methane was being liberated. 21 FMSHRC at 1095; Tr. 71-73. Fowler told mine superintendent Terry Suder to make sure that everyone was out of the mine. 21 FMSHRC at 1095.

Island Creek continued to pay all the miners including any who evacuated to the surface in the hope that a correction to decrease the methane level would occur quickly but later released them to go home. Tr. 144-145. Island Creek Superintendent Suder estimated that it took 45 to 50 minutes to evacuate the miners from the mine. Tr. 145. At trial, the parties stipulated that the first miners exited the mine at approximately 1:30 p.m. 21 FMSHRC at 1095.

Subsequently, the UMW filed a complaint for compensation requesting 2 ½ hours compensation for 41 miners, which included the remaining time on the 8:00 a.m. to 4:00 p.m. shift. Compl. at 2 and Ex. C. Island Creek opposed the complaint, and a hearing was held.

In his decision, the judge relied on the Commission's decision in *Local Union 1261, District 22, UMW v. Consolidation Coal Company*, 11 FMSHRC 1609 (Sept. 1989) ("*Local Union 1261*"), *aff'd sub nom. Local Union 1261 v. FMSHRC*, 917 F.2d 42 (D.C. Cir. 1990), which he concluded was controlling authority for the issues before him. 21 FMSHRC at 1095. The judge stated that the primary issue before him was "whether miners are entitled to compensation under . . . section 111 when the mine operator has voluntarily closed the mine for safety reasons prior to the issuance of an order described in section 111, but where such an order is subsequently issued." *Id.* The judge found that at 11:30 a.m., Canada told the dispatcher to get everyone out of the mine due to elevated methane. *Id.* at 1097. The judge further found that, when MSHA inspector Fowler issued the section 107(a) withdrawal order, the order to evacuate the miners had already been given by Island Creek. *Id.* Therefore, the judge concluded that, under the holding of *Local Union 1261*, MSHA's withdrawal order did not effectuate the removal of the miners and, thus, no miners were working when Fowler issued the withdrawal order. *Id.* The judge rejected the UMW's contention that Island Creek's decision to remove miners was made in anticipation of MSHA's issuance of a section 107(a) order in order to avoid liability for compensation of the miners. *Id.* at 1098. Accordingly, the judge dismissed the compensation proceeding. *Id.*

II.

⁶ Fowler explained at trial that he referenced the No. 4 and 5 developments in the order because they were the direct source of the methane, but the order would cause everyone underground to be evacuated because of the explosive range of methane. Tr. 87-88.

Disposition

The UMWA argues the judge's finding that the miners were not working when MSHA issued its section 107(a) order is not supported by substantial evidence. UMWA Br. at 6. In support, the UMWA relies on the stipulation that the first miners withdrawn appeared on the surface at 1:30 p.m. and that it took 45 to 50 minutes for miners to exit the mine following the evacuation order. *Id.* at 6-7. Therefore, the UMWA contends that miners could only have begun exiting the mine after 12:30 and after the MSHA inspector issued the section 107(a) order. *Id.* at 7; Reply Br. at 3-5. Alternatively, the UMWA argues that the miners were still in the mine working, even if evacuating, when the section 107(a) order issued. UMWA Br. at 7-8. The UMWA further argues that, even if the miners were not working at the time the section 107(a) order issued, nevertheless they qualified for relief because they were "working during the shift when the citation was issued," as required by section 111. *Id.* at 8. The UMWA distinguishes the Commission's decision in *Local Union 1261* because there miners were withdrawn from the mine and paid for the remainder of their shift on a day prior to MSHA's arrival and withdrawal order. *Id.* at 9-11. Finally, the UMWA argues that the Commission should not allow an operator to withdraw miners in anticipation of a withdrawal order in order to avoid section 111 compensation liability. *Id.* at 11-13.

Island Creek responds that the UMWA inaccurately stated in its brief some of the facts regarding the timing of events at the mine. I.C. Br. at 4-5. Island Creek further argues that the essential facts in the case are not in dispute. *Id.* at 5-6. Island Creek contends that the disposition of this case is governed by the Commission's decision in *Local Union 1261*, that the judge correctly applied the decision to the facts of the case, and that the MSHA inspector did not bear the brunt of miner animus because it was the operator who withdrew the miners. *Id.* at 6-7. Finally, Island Creek argues that the record does not support the UMWA's speculation that the miners were evacuated from the mine so it could avoid section 111 compensation liability. *Id.* at 8-9.

When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Section 111 of the Mine Act provides for compensation for the balance of a shift to miners who are "working during the shift" when a section 107 order issues if they are "idled" by the order. It is apparent that the miners in the VP 8 mine were working during the shift in which the

withdrawal order issued. Our focus in this proceeding then is whether the miners were idled by the MSHA order. In the *Local Union 1261* decision, the Commission reviewed an earlier application of the requirement. The Commission stated that the term “idled” includes both a physical removal from the mine and a prohibition from entering the mine.⁷ 11 FMSHRC at 1612 n.4 (citations omitted). The record in the instant proceeding does not reflect that either event had occurred at the VP 8 mine prior to the section 107(a) withdrawal order.⁸

The factual underpinning of the judge’s decision was that “the mine operator had voluntarily closed the mine for safety reasons prior to the issuance of an order described in section 111. . . .” 21 FMSHRC at 1095; *see also id.* at 1097. The judge found that Canada had contacted the mine dispatcher to evacuate the mine around 11:30 a.m. However, Canada’s actions, while prudent and commendable, are not by themselves determinative of whether miners were idled as a result of his telephone call or as a consequence of the subsequent section 107(a) withdrawal order. Even if some miners were evacuated to the surface as a result of Canada’s call, the record does not establish that all miners were evacuated or that those who were evacuated were barred from going back in the mine before Fowler issued the section 107(a) withdrawal order. Indeed, the testimony of Island Creek’s own witness shows that, after mine superintendent Suder learned of the withdrawal order, sometime after 1:00 p.m., he called to release miners on the surface, who were still being held and paid by Island Creek. Tr. 142-44. Thus, the status of

⁷ The primary issue in *Local Union 1261* was whether miners were working during the shift when MSHA issued its withdrawal order or were on the next working shift. 11 FMSHRC at 1615-16. In addressing the requirement in section 111 that miners must be “idled,” the Commission stated that, “We do not disavow the Commission’s earlier interpretation of ‘idled’” *Id.* at 1615. *Local Union 1261* is therefore instructive on the meaning of “idled” in section 111. Island Creek further argues that *Local Union 1261* is controlling on the disposition of entitlement to compensation in this proceeding. However, that decision dealt with the entitlement of miners to shift compensation for the day MSHA issued an order closing the mine, when the operator had voluntarily closed its mine on the day before, thereby barring miners on subsequent shifts from entering the mine. *Id.* at 1611. The complaint for miner compensation in *Local Union 1261* therefore involved a markedly different set of facts and ultimately involved a different provision of section 111 (“second sentence compensation”) than is involved in this proceeding (“first sentence compensation”). *See id.* at 1611-12.

⁸ While Commissioner Marks welcomes Commissioner Verheggen’s joining in the result, he does not agree that the Commission’s interpretation of the term “idled” needs to be disturbed. *See slip op* at 9-10. In his concurrence, Commissioner Verheggen correctly points out that the miners in this case, because they were paid by Island Creek for the time they spent exiting the mine and waiting on the surface, cannot be considered to have been “idled” under the terms of the statute until such time that they actually began to lose pay that they otherwise would have been due. *Id.* at 10. However, such an analysis only establishes the start of the first sentence compensation period; it does not answer the ultimate question this case presents, which is what caused the miners to be idled.

these miners was unchanged even after Island Creek ordered the evacuation of the mine. Consequently, the judge's determination that the mine was closed and that miners were idled prior to issuance of the withdrawal order is contrary to the overwhelming weight of record evidence.

As the Commission stated in *Local Union 1261*, "[A] miner who has been previously withdrawn from a mine can still be 'idled' by a subsequently issued withdrawal order in the sense that the miner is barred by the order from returning to work and that miners so idled may be entitled to compensation." 11 FMSHRC at 1615. Indeed, as Suder testified, until he found out about the withdrawal order, he expected that the miners who were held on the surface in pay status would be sent back into the mine. Tr. at 144-45. The Commission noted in *Local Union 1261* that an important legislative purpose in adopting section 111 was to insulate the mine inspector from any repercussions that might arise from the withdrawal of miners and temporarily depriving them of their livelihood. 11 FMSHRC at 1615 (citation omitted). Clearly, the section 107(a) withdrawal order, which directly resulted in the operator taking the miners out of pay status, embodied the precise harm that Congress was concerned about when it drafted section 111. Therefore, its application here to compensate miners, some of whom were out of the mine but still on mine property and being paid, is consistent with this legislative purpose.

Further, Island Creek's earlier evacuation notice did not result in the complete withdrawal of miners from the mine and the cessation of all work activities. Following the mine's evacuation notice, Fowler met rank-and-file miners in the mine and had to tell them to leave, and he instructed mine superintendent Suder to make sure everyone was out of the mine.⁹ 21 FMSHRC at 1095. Thus, we conclude that substantial evidence does not support the judge's determination that the mine had effectively closed prior to the Fowler's issuance of the section 107(a) withdrawal order.

Finally, Island Creek stipulated that miners did not exit the mine until 1:30 p.m. Given the testimony of Canada and Suder that it took 45 minutes to an hour to evacuate the mine (Tr. 108, 145), miners could not have begun evacuating the mine until 12:30 p.m. at the earliest, *after* the section 107(a) withdrawal order, which issued at 12:12 p.m. While this stipulation alone establishes entitlement of the miners to compensation, there is other record evidence that establishes that miners continued in pay status and were in the mine well after the Island Creek evacuation order, so that it is clear that they were affected by the MSHA order.

In short, given the judge's findings, the stipulation, and the testimony of Island's Creek's

⁹ It is evident from the record that this group of miners was not a repair crew authorized under section 104(c) of the Act, 30 U.S.C. § 814(c), because such a crew must be assigned by the operator to "eliminate the condition described in the [section 107(a) withdrawal] order." Canada testified that, when he told mine superintendent Suder about the section 107(a) withdrawal order, Suder was shocked and surprised to learn of the order. Tr. 128-29. Thus, Suder could not have ordered the repair of a problem, based on the order, about which he was unaware. In any event, Canada and Fowler ordered the miners out of the mine. Tr. 128-29.

own witnesses, substantial evidence does not support the judge's ultimate finding that "the removal of the miners previously ordered to be withdrawn by Canada, was not effectuated by Fowler's order." 21 FMSHRC at 1097. Rather, the evidence supports only one conclusion — that the miners were "idled" by the withdrawal order issued by Fowler and, therefore, are entitled to compensation for the remainder of the shift.

III.

Conclusion

For the foregoing reasons, we reverse the decision of the administrative law judge and remand the case to the judge for calculation of the compensation due miners for the 2 ½ hours of the shift during which they were idled by the section 107(a) withdrawal order.

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Commissioner Verheggen, concurring in result:

Like my colleagues in the majority, I would reverse the judge's decision in this matter and remand the case for calculation of the compensation and interest due the miners. I write separately, however, because the grounds on which I base my decision differ from those of my colleagues, as I explain below.

The provisions of the first sentence of section 111 of the Mine Act at issue here provide that when miners are idled by an imminent danger order, they "shall be entitled . . . to full compensation by the operator at their regular rates of pay for the period they are idled" during the shift when the order was issued. 30 U.S.C. § 821. Section 111 was intended to ensure that:

[M]iners who are withdrawn from a mine because of the issuance of a withdrawal order shall receive certain compensation during periods of their withdrawal. This provision . . . is not intended to be punitive, but recognizes that miners *should not lose pay because of . . . an imminent danger* which was totally outside their control. It is therefore a remedial provision . . .

S. Rep. No. 95-181, at 47 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 634-35 (1978) (emphasis added). In my view, given the clear purpose of section 111 to recompense miners for pay lost as a result of an imminent danger order, miners are "idled" for purposes of determining their eligibility for section 111 pay when they in fact actually cease being paid — when they are, in other words, "taken off the clock" because an imminent danger order has been issued.

My interpretation of section 111 differs somewhat from my colleagues, who view the term "idled" as including "both a physical removal from the mine and a prohibition from entering the mine." Slip op. at [5]. But here, Island Creek *continued to pay* its miners who were held on the surface in the hope that the problem which caused elevated methane levels would be corrected. Tr. 144-45. Mr. Suder testified:

A . . . We thought, you know, if this is just a small item, we can correct it and we can get back to work. Until I found out the particulars, we held the men.

Q Okay. And since you held them, you paid them until they were released to go home?

A Yes.

Id.

By 1:30 p.m. on the day in question, the problem was not corrected, and the miners were barred from reentering the mine because of the section 107 order in force by then¹⁰ — and this is when Island Creek discontinued paying the miners and released them to go home. Tr. 144-45. I also note that the UMWA's complaint requests 2½ hours of compensation, i.e., for the period from 1:30 p.m. to 4:00 p.m., the remaining time on the 8:00 a.m. to 4:00 p.m. shift when the miners were sent home. Compl. at 2 and Ex. C. The purpose of section 111 is to recompense *lost pay*, regardless of whether miners have been physically removed from the mine and are prohibited from reentering it. Thus, whether evacuation of the miners had been ordered in this case before the section 107 order was issued is irrelevant. The relevant question is instead whether the miners

¹⁰ I believe this answers the question Commissioner Marks poses in his footnote responding to my concurrence, i.e., “the ultimate question this case presents, which is what caused the miners to be idled.” Slip op. at [6 n.8]. At the time the miners were taken off the clock at 1:30 p.m., Island Creek could have continued paying them to wait for the methane problem to be corrected — in which case, the miners would not have been “idle” for purposes of section 111. When the company opted instead to discontinue paying the miners and release them to go home (Tr. 144-45), at that time, all the miners would have been able to do was wait because the section 107 order in force by then barred them from going back underground. In other words, the circumstances surrounding “the start of the first sentence compensation period” (slip op. at 6 n.8) in turn establish “what caused the miners to be idled” in this case.

have, in fact, lost compensation, to which they otherwise would have been entitled, as a result of the section 107 order.¹¹

¹¹ In *Local Union 1261, Dist. 22, UMW v. FMSHRC*, the District of Columbia Circuit opined in essence that to be idled for purposes of section 111, miners would have to be “on-the-job in the mine.” 917 F.2d 42, 47 (D.C. Cir. 1990). I do not believe that the interpretation I offer here of the first sentence of section 111 is inconsistent with this holding. Although the miners being held at the surface at the VP 8 Mine were not “in the mine” in the sense that they were underground, they were certainly still on the mine property. Moreover, the miners were “on-the-job” insofar as they were still being paid, albeit paid to do nothing but wait for further orders, a not uncommon situation for workers to be in on mine sites — or on any other job site of any description. As for the Commission case which the D.C. Circuit was reviewing, *Local Union 1261, Dist. 22, UMW v. Consolidation Coal Co.*, 11 FMSHRC 1609 (Sept. 1989), I agree with my colleagues that it “involved a markedly different set of facts and ultimately involved a different provision of section 111 . . . than in involved in this proceeding.” Slip op. at [5 n.7].

I thus find that the miners in this case, who were barred from reentering the mine by the section 107 order, then “idled” when taken off the clock, are entitled to compensation under section 111, and I join my colleagues in reversing the judge and remanding the case to him so that he may calculate an award of compensation and interest.

Theodore F. Verheggen, Commissioner

Distribution

Judith Rivlin, Esq.
United Mine Workers of America
8315 Lee Highway
Fairfax, VA 22031-2215

Elizabeth Chamberlin, Esq.
Robert Vukas, Esq.
Consol Inc.
1800 Washington Road
Pittsburgh, PA 15241

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041